Supreme Court, U.S.
FILED
SEP 8 1999
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No. 99-249

IN THE
Supreme Court of the United States

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

UNIBELL ANESTHESIA, P.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES AND RULE 29.6 STATEMENT

The petition accurately lists the parties to the proceeding.

There is no parent or publicly held company owning 10% or more of the stock of respondent Unibell Anesthesia, P.C.

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COUNTERSTATEMENT OF THE CASE

Respondent Unibell Anesthesia, P.C. ("Unibell"), respectfully submits this brief in opposition to the petition for a writ of *certiorari* to the Supreme Court of the State of New York, Appellate Division, First Department, of petitioner The Guardian Life Insurance Company of America ("Guardian").

1. Introduction

This case arises from a series of misrepresentations made by Guardian in order to induce Unibell to purchase, and to pay exorbitant premiums for, the group health insurance policies covering Unibell's employees that Unibell purchased from Guardian in 1991 and 1992. The misrepresentations concerned the costs of medical care for one of Unibell's employees, a nurse-anesthetist named Greta Filler.

In late 1988, Ms. Filler suffered a catastrophic illness, a brain tumor with serious post-surgical complications, that resulted in a three-year hospital stay. Following the onset of Ms. Filler's condition, Guardian increased Unibell's annual premiums from approximately two hundred seventy thousand dollars in 1989 to nearly one million dollars in 1992. Unibell proved that Guardian misled Unibell into paying these exorbitant premiums by painting a misleading picture of massive looming expenditures for Ms. Filler's care at a time when Guardian knew, but Unibell did not, that Guardian's risk with respect to Ms. Filler had in fact dramatically declined.

To induce Unibell to pay these excessive premiums, Guardian:

(i) concealed that the federal Medicare program had become the primary insurer for Ms. Filler as of 1991 — coverage that Guardian was "instrumental" in procuring, but about which it did not advise Unibell until 1993, an "error" for which Guardian later "apologized";

(ii) cited in its renewal notice for the Unibell policy in 1991 a figure of $1,118,000 for claims "incurred" during the prior year as justification for an increase in Unibell's annual premium; in fact, the $1.1 million in "incurred" claims included over $500,000 in bills for Ms. Filler's care that dated back two or more years; and

(iii) in its renewal letter for 1992, told Unibell that it had "no recourse" but to increase its premiums yet again (by an additional $250,000) and then confirmed to Unibell's insurance broker that this was due to the "large, ongoing" claims incurred, when the incurred claims had in fact precipitously declined, as had Guardian's prospective risk, because of Ms. Filler's undisclosed Medicare-primary status.

After five days of trial — interrupted during its first day by Guardian's frivolous removal of this then two-and-a-half-year-old action to the United States District Court for the Southern District of New York, followed by an immediate remand — and a day of deliberation, the jury returned a verdict for Unibell on its causes of action for constructive fraud, negligent misrepresentation, unjust enrichment and a violation of New York's Insurance Law section 4226, which prohibits an insurer from selling its policies by

misrepresenting their "terms, benefits or advantages." The Supreme Court of the State of New York, New York County, entered judgment for Unibell in the total amount of $2,175,132.56. (R 11a-12a.)[1]

Guardian took two appeals in this matter, one from the order of the trial court denying Guardian's pre-trial motion for summary judgment, and a second from the trial court's order denying Guardian's motion to set aside the verdict. On each occasion, the Appellate Division unanimously affirmed and declined to grant permission for a further appeal to the New York Court of Appeals.

Guardian's petition for a writ of *certiorari* to the Appellate Division seeks review of its contention, raised for the first time more than two years after the commencement of this action, that Unibell's state law claims arising from Guardian's deceptive insurance sales practices are preempted by the Employee Retirement Income Security Act of 1974, commonly known as ERISA. The position advanced by Guardian has been uniformly and repeatedly rejected by numerous federal and state courts, applying principles of federal law that have been definitively determined by this Court. Guardian has failed to identify any compelling reason for the issuance of a writ of *certiorari*, nor has it made even a colorable showing that the disposition of this matter by the courts of the State of New York was inconsistent in any respect with federal law. Accordingly, Guardian's petition should be denied.

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1. References to pages of the record on appeal to the Supreme Court of the State of New York, Appellate Division, First Department, filed by Guardian, are cited as "R __." References to the petition for a writ of *certiorari* filed by Guardian are cited as "Pet. at __."

2. Unibell's Purchase Of Group Health Insurance From Guardian

Unibell is a professional corporation that provides anesthesiology services to patients at New York University Medical Center and Bellevue Hospital, in addition to training residents at those teaching hospitals and performing medical research. (R 78-79, 412-13.) The president of Unibell is Dr. Herman Turndorf, who is also the chairman of the department of anesthesiology at the NYU Medical Center and a professor of anesthesiology at the NYU School of Medicine. (R 78, 410-11.)

Unibell first purchased a group health insurance policy from Guardian in 1975 or 1976. (R 260.) The Guardian policy was renewable annually, for one-year periods only. (R 261.) Each October, Unibell would receive a letter from Guardian that would advise Unibell of the proposed premium for the coming year.

3. Greta Filler's Catastrophic Illness

In approximately September 1988, one of Unibell's employees, a nurse-anesthetist named Greta Filler, underwent a sixteen-hour surgery to remove a brain tumor, which resulted in her becoming severely disabled. Ms. Filler spent the next three years in the hospital, or in the Rusk Institute for Rehabilitative Medicine. (R 417.) After she was discharged from the Rusk Institute in 1991, Ms. Filler returned home, where she required the assistance of a home health care aide or a nurse. (R 889.)

4. The 1991 And 1992 Renewals

Until the events at issue, the format of Guardian's renewal proposals varied little from year to year, and did not refer at all to Unibell's prior claims history. (R 83-84, 130a.) In its annual premium proposal dated October 14, 1991, however, Guardian deviated from its letters of prior years, and recounted that Guardian had "incurred claims" in the prior year in an amount exceeding $1.1 million. (R 132a-33a.) Noting that Guardian's premium rates were established pursuant to an "experience rating plan" and that Unibell's loss ratio for the prior year was "significantly above average," Guardian advised that it must increase Unibell's rates. (R 132a.) A seventy-five percent premium increase — to approximately $700,000 — was proposed. (R 89-90, 424.)

Although Dr. Turndorf was unhappy about the dramatically increased premium, he believed that Unibell had no choice but to pay it because he felt a moral obligation to provide continued health care coverage for Ms. Filler, and saw no alternative. (R 90.)

Guardian's annual letter to Unibell, dated October 13, 1992, omitted the section of its prior letter that compared premiums to claims incurred. Rather, Guardian reported that, notwithstanding the prior year's dramatic increase, it was again left with "no recourse but to increase your Health Insurance rates in the coming year." (R 134a-135a, 92-93, 226.) This predictably left Unibell with the impression that Guardian was continuing to incur claims at least at the level of the year before, because Ms. Filler's condition had stabilized. (R 217-18, 427-29.) Unibell's broker, who was asked by Unibell to contact Guardian to determine the reason for the premium increase, confirmed this impression. (R 214-

16.) The broker reported back that Guardian had represented that it was raising the premiums once again because of "the same ongoing claim" that had caused Guardian to raise the rates in the prior year — *i.e.*, the claim of Ms. Filler. (R 277-78.) Guardian increased Unibell's premium to approximately $943,000. (R 92, 640.)

5. Guardian Discloses That Medicare Was The Primary Insurer For Ms. Filler

In early 1993, Unibell's office manager became "puzzled" when he discovered certain forms that indicated that Medicare had paid some of Ms. Filler's bills. (R 312-13.) At his request, Unibell's bookkeeper questioned Guardian about this. Approximately one week later, Unibell received a letter from Guardian, dated March 15, 1993, which acknowledged for the first time that, for the prior two years, Medicare, not Guardian, had been primarily responsible for paying for Ms. Filler's care. The letter apologized for "any inconvenience our error may have caused you regarding the proper order of benefits." (R 129a.) Unibell's office manager did not know prior to the receipt of this letter in March 1993 that Medicare was the primary insurer for Greta Filler's claims. (R 314-15.) Neither did Unibell's vice president (R 93-95) or Dr. Turndorf (R 432-33), or Unibell's insurance broker. (R 276.)

Guardian did, however, know that Ms. Filler was Medicare-primary — its claims department was "instrumental in getting her on Medicare." (R 567-68, 274a.) Guardian's underwriting department, which was responsible for determining Unibell's renewal premiums and generating the annual renewal letters, was also aware that Ms. Filler was Medicare-primary. (R 565-66, 270a-72a; *see also* R 784a.)

Dr. Turndorf testified that, when he learned of the letter in which Guardian finally disclosed that Ms. Filler was Medicare-primary, he was "confused" because of the inconsistency between that fact and Guardian's earlier representations of very large ongoing incurred claims for Ms. Filler. (R 432-33.) Dr. Turndorf also testified that if he had known in 1991 that Medicare was the primary insurer for Greta Filler's claims, Unibell would not have renewed the Guardian policy on the terms proposed. (R 433.)

6. Guardian's Misleading Statements Concerning "Incurred Claims"

Unibell alleged in its original complaint, filed in October 1994, that Guardian had fraudulently overstated its risk in inducing Unibell to renew. The focus of that complaint was Guardian's failure to disclose that Medicare had become the primary payor for the claims of Greta Filler. It became apparent during discovery, however, that Guardian had also obscured Ms. Filler's Medicare status in another way. (*See* R 64a-68a.)

Unibell learned that the $1.1 million figure cited by Guardian in its 1991 renewal letter actually included claims for services rendered to Greta Filler in 1988, 1989, 1990 and 1991. (R 628-29.) Of the total of over $1,118,000, more than $500,000 related to two claims for Greta Filler's care that dated back as far as 1988. (R 622-27.) Those claims would have been Guardian's obligation even if Unibell had not renewed in 1989 or 1990. (R 744-45.)

When Unibell received the 1991 renewal letter, Dr. Turndorf and other Unibell personnel believed that the "incurred claims" figure represented "the cost of care

provided to all Unibell employees, including Greta Filler, during the time period referenced in the letter of September 1, 1990 to August 31 of '91." (R 91, *see also* R 487-88, 494, 496-97.) Unibell also presented the expert testimony of a consultant and broker in the field of group insurance plans with over thirty years experience in the insurance industry (R 724-25), who confirmed that Dr. Turndorf's understanding of "incurred claims" is in fact the common understanding in the insurance industry — a claim is "incurred" within a particular period if the service for which coverage is sought was provided during that period. (R 744.)

In sum, in the October 1991 letter, Guardian advised Unibell that it had "incurred claims" of over $1.1 million during the preceding twelve months when in fact most of those claims had been incurred prior to that period. Moreover, if Greta Filler were to need further hospitalization, her claims would be the primary responsibility of Medicare, a fact known to Guardian, but which Guardian never told Unibell. Indeed, of the more than $870,000 in claims for Greta Filler that were included in the $1.1 million total, not one was incurred after April 1, 1991, the date on which she became Medicare-primary. (R 627-28.)

Guardian's renewal underwriters had all of this information and concluded that the following year's claims would not be anywhere near as high as $1.1 million — they in effect "discarded" over half that amount as having no predictive value for the following year's claims. (R 871-73.) Nevertheless, Guardian included the full $1.1 million figure in the renewal letter, without any attempt to explain the origins or the limitations of that misleading number. This grossly inflated number was included in the letter to persuade Unibell to renew, despite the fact that it was being asked to pay a 75% higher premium. (R 879-82.)

When Unibell finally learned that Ms. Filler was Medicare-primary, it was able to leave Ms. Filler off of the plan, without impairing her ability to receive the health care she needed, and to purchase insurance from a different company. (R 102-03, 429-31.) As a result, Unibell saved nearly $800,000 in a single year. (R 103.)

7. Proceedings Below

Unibell commenced this action in the Supreme Court of the State of New York in October 1994, asserting causes of action for (i) fraud; (ii) constructive fraud; (iii) negligent misrepresentation; (iv) violation of section 4226 of New York's Insurance Law, which prohibits an insurance company from misrepresenting the "terms, benefits or advantages" of its policies; (v) violation of section 349 of New York's General Business Law, which prohibits unfair and deceptive trade practices; and (vi) unjust enrichment. (R 16a-31a.)

In October 1996, at the conclusion of discovery, Guardian moved for summary judgment. The Supreme Court denied Guardian's motion by decision dated January 13, 1997 (R 83a-90a), relying, in part, on the evidence concerning the incurred claims, and concluding that Unibell had adduced more than sufficient evidence to support all of its causes of action. (R 84a-86a.)

Guardian appealed from the denial of its summary judgment motion and, on May 15, 1997, the Appellate Division, First Department, unanimously affirmed the lower court's decision. (R 91a-92a.) On July 3, 1997, the Appellate Division denied Guardian's motion for an order granting reargument, or, in the alternative, granting leave to appeal

to the New York Court of Appeals. (RA 11.) At no time during the briefing or argument of Guardian's summary judgment motion, its appeal of the denial of that motion, or its motion for leave to reargue or appeal to the Court of Appeals, did Guardian contend that the evidence concerning the incurred claims ought not be considered, or that this action was in any respect preempted by ERISA.

It was not until shortly before trial, two and one-half years after this action was commenced, that Guardian first raised the contention that it presses on this petition for *certiorari* — that this action is preempted by ERISA. Guardian moved by order to show cause, returnable the morning the trial was scheduled to begin, to preclude Unibell from offering any evidence that Guardian had misrepresented Unibell's "incurred claims" in its renewal letters, on the ground that such allegations were preempted by ERISA, and because Unibell had not explicitly alleged in its Amended Complaint that the "incurred claims" figures were false or misleading. (R 34a-39a.) Unibell opposed the motion, pointing out that it had contended from the outset that Guardian had fraudulently overstated its risk in insuring Unibell's employees,[2] and that the supporting evidence concerning incurred claims had been central to Unibell's arguments both in opposition to Guardian's summary judgment motion, and on appeal from the denial of that motion. Unibell also protectively cross-moved to amend its Amended Complaint to add a single paragraph describing this evidence. (R 60a-62a.)

2. In fact, the language concerning overstatement of risk that Guardian incorrectly claims was added on the first day of trial (*see* Pet. at 4-5) appeared in Unibell's original Complaint, filed in October *1994* and in its Amended Complaint, filed in March 1995, over two years before the trial started. (*See* R 17a, 64a.)

In a decision rendered on the record before the jury was seated, the trial court denied Guardian's motion to preclude Unibell's evidence and granted Unibell's cross-motion to amend the complaint. (R 14a, 5-12.) The court rejected Guardian's claim that it would suffer prejudice from the presentation of the "incurred claims" evidence, explaining:

> [T]he nature of the proof the plaintiff seeks to offer and the nature of the claims have been in this case for some time — some time being at least prior to the making of the motion for summary judgment. . . . It involved issues that were before the Appellate Division and matters that were briefed in that Court in the appeal which was recently decided by that Court. I don't see any surprise or change of legal theory involved in what plaintiff seeks to do.

(R 6-7.)

The court also rejected Guardian's assertion that Unibell's claims concerning the fraudulent nature of the "incurred claims" figures in Guardian's renewal letters were preempted by ERISA. (R 7-12.) The court recognized that allegations of fraud against an insurer acting as a seller of insurance are not preempted by ERISA merely because the insurer happens also to be, in another capacity, an ERISA fiduciary. (R 8.) Finally, the court observed that Guardian's motion to preclude Unibell's evidence "was intentionally made at the last minute in an effort to delay this trial and borders on bad faith." (R 12.)

Having had no success in persuading the state courts that Unibell's claims should be dismissed, Guardian made

one last attempt to avoid trial. Upon returning from the lunch recess on the first day of trial, Unibell learned that Guardian had removed the action to the United States District Court for the Southern District of New York, more than two-and-a-half years after the commencement of this action. (R 972a-73a.) Upon Unibell's motion by order to show cause served that same afternoon, the Honorable John S. Martin, Jr., U.S.D.J., issued a remand order on the morning of July 3, holding that the notice of removal was not timely filed. (R 974a-76a.)

The jury was reconvened and the matter was tried through July 11, 1997. On July 11, the jury returned a verdict for Unibell on its causes of action for constructive fraud, negligent misrepresentation, unjust enrichment and a violation of Insurance Law section 4226 relating to one of the two policy periods at issue. The jury returned a verdict for Guardian on Unibell's actual fraud and General Business Law section 349 claims, as well as on Unibell's Insurance Law section 4226 claim relating to the other policy period at issue. (R 1268-83.)

In August 1997, Guardian moved in the trial court to set aside the verdict and direct judgment for Guardian, or, in the alternative, for a new trial, once again raising its ERISA pre-emption argument (R 1138a-39a.) In October 1997, the trial court denied Guardian's motion. (Pet. App. B), pointing out that Guardian's argument fundamentally mischaracterized the nature of this case. The court wrote:

> The majority of defendant's argument is based on its notion that the case is about how it reports its claims incurred or potential claims. The simple fact in this case is that plaintiff asserted that the

> method in which defendant sought renewals of the insurance policy was fraudulent and misleading. The causes of action relate to defendant's efforts to enter into a different contract with plaintiff than the one that was expiring. . . . *The fact that Guardian was a claims fiduciary had nothing whatever to do with the representations it made in attempting to sell additional insurance for the following year.*

(Pet. at 6a-7a) (emphasis added).

Guardian did not perfect its appeal to the Appellate Division until September 1998. On December 29, 1998, the Appellate Division affirmed the judgment, holding that "[t]he jury's finding in plaintiff's favor on its causes of action for constructive fraud, negligent misrepresentation, unjust enrichment and violation of Insurance Law § 4226 was amply supported by the evidence. . . ." (Pet. at 2a.) The Appellate Division also held that, even if it were appropriate to consider Guardian's ERISA preemption argument in light of Guardian's failure to raise it in its answer or pre-trial motions, the "preemption claim would still fail since defendant, at the time of the misrepresentations upon which plaintiff's fraud claim is premised, was merely engaged in the sale of additional insurance — an activity plainly subject to State regulation, ERISA notwithstanding — and not acting in a capacity of an ERISA claims fiduciary . . . ." (*Id.*) On February 11, 1999, the Appellate Division denied Guardian's motion for reargument, or, in the alternative, for leave to appeal to the New York Court of Appeals. (Pet. App. C.)

On May 13, 1999, the New York Court of Appeals also denied Guardian's motion for leave to appeal.

(Pet. App. D.) That court correctly recognized that there was no basis for further review of the Appellate Division's unassailable holdings, including its determination that this action is not preempted by ERISA.

REASONS FOR DENYING THE WRIT

I.

THE APPELLATE DIVISION'S CONCLUSION THAT THIS ACTION IS NOT PREEMPTED BY ERISA IS A CORRECT APPLICATION OF WELL-SETTLED AUTHORITY

Like the Appellate Division below, numerous other courts, applying principles clearly enunciated by this Court, have rejected the contention that ERISA preempts claims such as Unibell's, which are premised on misrepresentations made by insurers in the course of selling insurance to employers. The existence of such overwhelming and uniform authority refuting Guardian's position belies any claim that the questions proposed for review by Guardian are "of exceptional importance to ERISA jurisprudence." (Pet. at 24.) Moreover, most of the questions proposed by Guardian (Pet. at i) are not even presented by this case.

A. Unibell's Claims Do Not "Relate To" An ERISA Plan

In *De Buono v. NYSA-ILA Medical & Clinical Services Fund*, __ U.S. __, 117 S. Ct. 1747, 1750-51 (1997), this Court flatly rejected the "strictly literal" view of the phrase "relate to" in the ERISA preemption provision, which the Court had applied in its earlier cases, and to which Guardian apparently

would have the Court return.[3] *Accord*, *California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, __ U.S. __, 117 S. Ct. 832, 843 (1997) (Scalia, J., concurring) ("applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else"). Rather, the Court held, the phrase "relate to" must be construed in light of the purposes for which ERISA was enacted — principally to protect the participants and beneficiaries of employee benefit and welfare plans. *De Buono*, 117 S. Ct. at 1750-51. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).[4]

Thus, this Court has made clear that preemption is unnecessary and inappropriate in matters not directly related to plan administration or participant claims for benefits, particularly where a strong state interest is present, such as the state interest in regulation of the insurance industry. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99-100 (1993); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 727-30 (1985). Mindful of these policies and objectives, courts have held repeatedly that ERISA does not preempt claims brought by employers against insurance companies and their agents for

3. Congress provided that ERISA "shall supersede any and all State laws insofar as they . . . *relate to* any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a) (1997) (emphasis added).

4. In *Shaw*, an early case addressing the scope of ERISA preemption, this Court held that a state law is not preempted when it has only a "tenuous, remote, or peripheral" connection with a covered plan. 463 U.S. at 100 n.21. Although *Shaw* suggested in dicta that the phrase "relate to" should be construed "in the normal sense of the phrase," this more expansive approach has now been authoritatively abandoned.

misrepresentations made in connection with the sale of insurance policies, even where certain aspects of the policies are governed by ERISA.

"Denying . . . a state law action based upon misrepresentation by the plan's insurer in no way furthers the purposes of ERISA." *Hospice of Metro Denver, Inc. v. Group Health Ins. of Oklahoma, Inc.*, 944 F.2d 752, 756 (10th Cir. 1991). *See also Morstein v. National Ins. Servs. Inc.*, 93 F.3d 715, 716, 724 (11th Cir. 1996), *cert. denied sub nom. Shaw Agency v. Morstein*, __ U.S. __, 117 S. Ct. 769 (1997) (employer's state law claims against insurance agent and his agency for fraudulent inducement to purchase and negligent processing of the application for an ERISA-governed insurance plan were not preempted by ERISA); *Taylor Forge Engineered Sys., Inc. v. Beauchamp*, No. Civ. A. 98-2572-KHV, 1999 WL 450955 (D. Kan. June 17, 1999) (state law fraud claim based upon misrepresentations made by seller of insurance to prospective purchaser concerning financial viability of existing ERISA-governed plan did not interfere with the goals of ERISA and would not be preempted); *Hardy v. Fisher*, 901 F. Supp. 228, 232 (E.D. Tex. 1995) (suit by employer/purchaser of ERISA-governed insurance policy against seller of policy for fraud does not affect the relationship among ERISA entities, and preemption will not further the congressional goal of promoting the interests of plan beneficiaries or affect the administration of the plan); *Cook Wholesale of Medina, Inc. v. Connecticut Gen. Life Ins. Co.*, 898 F. Supp. 151, 156 (W.D.N.Y. 1995) (ERISA did not preempt plan sponsors' suit in state court against insurance companies for fraudulent and negligent misrepresentation); *DiPietro-Kay Corp. v. Interactive Benefits Corp.*, 825 F. Supp. 459 (D. Conn. 1993) (plaintiff's misrepresentation claims were not preempted by

ERISA since administration of the plan was not implicated); *McDonald v. Houston Brokerage, Inc.*, 928 S.W.2d 633 (Tex. Ct. App. 1996), *cert. denied*, __ U.S. __, 118 S. Ct. 54 (1997) (suit by employer and plan beneficiaries against insurance broker for fraud, misrepresentation and deceptive trade practices was not preempted by ERISA).

These cases uniformly hold that insurance companies are not immune from state regulation of their sales and marketing practices, or from state common law and statutory liabilities, merely because their insurance products are used in the context of ERISA plans. Guardian nonetheless persists in advancing the *non sequitur* that this principle does not apply here because Guardian was an ERISA "claims fiduciary" for purposes of processing the claims of Unibell's employees. The fundamental flaw in Guardian's argument is that Unibell simply did not sue Guardian for any action that Guardian took in that capacity, much less "assault" Guardian's administration of an ERISA plan (*see* Pet. at 9).

Unibell has never contended that Guardian violated any of its duties as an ERISA claims fiduciary, or that Guardian mismanaged or improperly administered its employee welfare plan. Nor has Unibell ever challenged any of Guardian's determinations with respect to the payment of any claims under the plan, including the two bills totaling $500,000 from NYU Medical Center to which Guardian refers (*see* Pet. at 9). Unibell never challenged the interpretation or validity of any of the terms of the plan, nor did it question the consistency of those terms with Guardian's representations in the course of its efforts to sell Unibell a new policy.[5]

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5. Thus, contrary to Guardian's rhetorical musings (Pet. at 12-13), the courts below did not misconstrue the terms of the plan. In fact, they did not construe the plan at all.

Rather, Unibell claimed, and proved, that Guardian deceived Unibell in connection with its efforts to sell Unibell new insurance policies in 1991 and 1992 — misconduct having nothing whatever to do with the administration or terms of any ERISA-governed plan. As the Appellate Division properly held, Guardian, "at the time of the misrepresentations upon which plaintiff's fraud claim is premised, was merely engaged in the sale of additional insurance — an activity plainly subject to State regulation, ERISA notwithstanding — and not acting in the capacity of an ERISA claims fiduciary." (Pet. at 2a.) Accordingly, ERISA does not preempt Unibell's claims. *See Raff v. Travelers Ins. Co.*, No. 90 Civ. 7673, 1997 WL 473282, at *3, n.6 (S.D.N.Y. May 28, 1997), ("[w]hile Travelers might be considered a fiduciary of the Fund with respect to the administration of claims and benefits, it was not a fiduciary with respect to the arms-length, contractual relationship between the parties").

Guardian seeks to bridge this gap by contending that Unibell's claims are preempted by ERISA because Guardian's misrepresentations *referred to* actions (*i.e.*, the payment of claims) taken in an ERISA fiduciary capacity — even though Guardian was not acting as an ERISA fiduciary at the time of the misrepresentations. (*See* Pet. at i). The argument is devoid of merit. In the misleading renewal notices sent to Unibell, Guardian made no reference whatever to the terms of any ERISA plan, nor was it purporting to be acting pursuant to any such plan. An action does not "relate to" an ERISA plan merely because misrepresentations made in a non-ERISA fiduciary capacity happen to refer to acts performed in a fiduciary capacity. As noted, this Court has mandated that the phrase "relate to" be construed in accordance with the congressional goals in enacting ERISA. *De Buono*, 117 S. Ct. at 1750-51. As the cases cited above

have recognized (*see* 16-17, *supra*), the prosecution of state law fraud claims under such circumstances has no material effect on the interests of ERISA plan beneficiaries or on the administration of ERISA plans. *See also Taylor Forge Engineered Sys., Inc.*, 1999 WL 450955 (state law fraud claim based upon misrepresentations made by seller of insurance to prospective purchaser concerning financial viability of existing ERISA-governed plan did not interfere with the goals of ERISA and would not be preempted).

Guardian's argument is essentially that any reference to the payment of claims, regardless of the context or purpose, "relates to" an ERISA plan. But that limitless conception of ERISA preemption has already been authoritatively rejected. Because "everything is related to everything else," preemption would "never run its course" if the phrase "relate to" were to be taken so literally and expansively. *See De Buono*, 117 S. Ct. at 1750-51 & n.7. In any event, such "tenuous, remote, or peripheral" relationships to ERISA plans were never sufficient to trigger preemption, even before this Court's decision in *De Buono*. *See Shaw*, 463 U.S. at 100, n.21.

B. The Cases Cited By Guardian Do Not Support Its Contentions

Guardian relies principally on *Varity Corp. v. Howe*, 516 U.S. 489 (1996), a case cited by Guardian for the first time in its reply brief on its second appeal to the Appellate Division, to support its preemption argument. (Pet. at 13-16, 19.) *Varity*, however, is fundamentally different from this case. Indeed, preemption was not even an issue in *Varity*.[6]

6. The fact that Guardian did not cite this Court's 1996 opinion in *Varity* until it served its second appellate reply brief in January (Cont'd)

In *Varity*, an employer induced its employees to withdraw from the employer's self-funded medical and non-pension benefits plan by deliberately misleading the employees as to the solvency of the subsidiary that would assume those obligations. The employer was also the ERISA plan administrator. The issue before this Court was whether the employer's deception occurred in its capacity as a plan administrator, thereby implicating its fiduciary obligations under ERISA. The Court held that when the employer conveyed benefits information to plan beneficiaries for the ostensible purpose of assisting those beneficiaries in making an informed choice about continued participation in the plan, the employer engaged in "plan-related activity," and indeed, an act of plan "management" and "administration" sufficient under the statutory definition (29 U.S.C. § 1002(21)(A) (1997)) to trigger the employer's ERISA fiduciary obligations. *Id.* at 502.

In *Varity*, this Court expressly rejected the employer's argument "that it was not engaged in plan administration." *Id.* at 504. Here, the trial court determined, as a matter of fact, that Guardian was *not* acting in its ERISA fiduciary capacity when it made misrepresentations to Unibell in its renewal notices.

Guardian's reliance on *Woodworker's Supply, Inc. v. Principal Mutual Life Insurance Co.*, 170 F.3d 985 (10th Cir. 1999) (*cited* in Pet. at 15-16) rests entirely on a classic flaw in logic. In *Woodworker's Supply*, the court held only that an insurer could be liable under state law for

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1999, belies its suggestion (Pet. at 19) that its belated preemption argument is attributable to the fact that *Varity* purportedly "changed, or at least clarified, significantly, the law in this area."

misrepresentations made in attempting to sell an ERISA-governed plan, where such actions were taken "pre-plan" and not in an ERISA fiduciary capacity. *Id.* at 991. From that narrow holding, Guardian erroneously deduces that all "post-plan" actions by an ERISA fiduciary — regardless of whether or not they were undertaken in an ERISA fiduciary capacity — must therefore give rise to preemption. In fact, the court in *Woodworker's Supply*, expressly *refused* to find that the post-plan claims at issue in that case were preempted by ERISA, on the ground that there was not a sufficient record to determine what the alleged misconduct was. *Id.* at 996. The court thus plainly, albeit implicitly, recognized that state law claims based upon post-plan conduct are *not* necessarily preempted merely because the challenged conduct occurs "post-plan."

Thus, even if Guardian's conduct here were considered to be post-plan, the Appellate Division correctly determined that Unibell's claims were not preempted, since Guardian's ERISA-fiduciary status was not implicated at all by this action. *See Woodworker's Supply*, 170 F.3d at 992 ("a state's 'efforts to prevent sellers of goods and services, including benefit plans, from misrepresenting . . . the scope of their services is quite remote from the area with which ERISA is expressly concerned' ") (*quoting Wilson v. Zoellner*, 114 F.3d 713, 720 (8th Cir. 1997)).[7]

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7. Guardian argues that, even though the trial court ruled on the merits of its ERISA preemption claim, the court erred by criticizing Guardian for failing to raise the issue earlier and by not recognizing the non-waivability of Guardian's preemption defense. (Pet. at 15 n.5.) Guardian is wrong on both counts. First, the trial court correctly recognized that Unibell's allegations concerning Guardian's misleading "incurred claims" figures, had been in the

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C. Unibell's Claims Do Not Implicate The Administration Of Any ERISA Plan

Guardian asserts here, for the first time, that this action implicates ERISA because the evaluation of Unibell's claims required an interpretation of the ERISA-governed plan. Specifically, Guardian contends that it was necessary to make reference to the plan's definitions of the terms "charge" and "claim" in order to determine whether or not the incurred "claims" figure in Guardian's 1991 renewal notice to Unibell was misleading. (Pet. at 4, n.3, 6-8, 16-17.)

Guardian's contention should be rejected for its failure to assert it below, *United States v. New York Telephone Co.*, 326 U.S. 638, 651 n.18 (1946), and because it is, in any event, erroneous. Nowhere in Guardian's 1991 renewal notice, sent to persuade Unibell to enter into a new contract, did Guardian purport to be interpreting, much less administering, an ERISA plan. The 1991 letter made no reference to the terms of the existing contract and certainly did not refer the reader to the plan for the definition of "incurred claims" or any other term.

Moreover, Unibell's claims did not turn on any interpretation of the existing contract. Dr. Turndorf testified

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case for many months. (R 6-7.) Further, ERISA preemption, if not timely asserted, is in fact waived. *See Allen v. Westpoint-Pepperell, Inc.*, 11 F. Supp. 2d 277, 283 (S.D.N.Y. 1997) (ERISA preemption is a waivable affirmative defense — it is merely a choice of law provision, not jurisdictional); *Adsit v. Quantum Chem. Corp.*, 199 A.D.2d 899, 900 (3d Dep't 1993) (ERISA preemption is a waivable affirmative defense). Thus, Guardian's waiver of the preemption defense constitutes an additional reason to deny its petition for *certiorari*.

that, based solely on Guardian's 1991 renewal notice, he understood Guardian to be describing the cost of care that was provided to Unibell employees during the time period referenced in the letter. (R 91.) Unibell's expert confirmed that Dr. Turndorf's understanding was in fact the common understanding in the industry (R 744), and Guardian's own witnesses testified to employing the term in the manner understood by Dr. Turndorf. (R 602-03, 708-09, 864.)

In short, any distinction in the existing contract between the terms "charge" and "claim" had nothing whatever to do with Guardian's misrepresentation of the amount of "incurred claims" in attempting to sell new insurance to Unibell. The jury simply was not required, asked or instructed to base its decision on an interpretation of the plan. Therefore, the second of Guardian's "questions presented" (Pet. at i), concerning whether an action to interpret an ERISA plan may be maintained in state court, is not a question that is presented by this case.

D. The Judgment Does Not Implicate In Any Way The Finances Or The Reporting Requirements Associated With ERISA Plans

Guardian erroneously maintains that this case implicates ERISA because the judgment prevents Guardian from taking into account all claims paid in the most recent fiscal year when proposing a renewal, if the claims were for medical services rendered in a prior year. (Pet. at 13, 18.) Indeed, Guardian goes so far as to assert that it "pays approximately 285 million dollars annually for claims for medical services received by insureds during earlier years" and that the judgment, if allowed to stand, would therefore "create financial havoc for ERISA plans." (Pet. at 18, *see also* Pet. at 7-8, n.4.)

This case has never been about whether the renewal premiums proposed by Guardian were appropriate. Guardian may calculate a policyholder's experience, and determine the premium it will charge, in any manner it chooses. The judgment simply holds Guardian accountable for deceiving a prospective policyholder.[8]

Guardian also incorrectly asserts that the judgment, if allowed to stand, will force Guardian to report claims differently in New York than in the rest of the country. (Pet. at 18.) The fallacy of that argument is clear — ERISA has nothing whatever to do with the content of Guardian's renewal letters. As the trial court correctly noted:

> [T]here is no ERISA requirement that defendant submit any claims data in its request for a renewal policy. The decision to include claims data is one that Guardian chose for itself and this action related to the inadequacy and misleading nature of that data. It did not impact required reporting or the payment of any claims.

(Pet. at 7a.)

Thus, as correctly recognized by the trial court, the judgment does not require Guardian to report its claims

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8. Guardian erroneously asserts that Unibell's expert challenged Guardian's administration of the plan when he purportedly testified that, "when computing premium rates for the next policy year, Guardian should not have considered any amounts paid during the prior policy year for services received by Unibell insureds during earlier policy years." (Pet. at 7.) The cited portion of the record (R 773) contains no such testimony. In fact, Unibell's expert expressly disclaimed that position. (R 769-70.)

experience at all in its renewal letters. Nor does ERISA. Indeed, most often, Guardian does not report such information. Therefore, the third of Guardian's "questions presented" (Pet. at i), concerning whether an action may be maintained in state court to determine what information must be disclosed by an insurer during the course of the renewal of an ERISA plan, is also a question that is not in fact presented by this case.

E. The District Court Remand Order Did Not Reach The Question Of ERISA Preemption

Guardian contends that, because Judge Martin of the United States District Court for the Southern District of New York never addressed the substance of Guardian's ERISA preemption argument in remanding the case to state court, the district court must have decided that issue in Guardian's favor. (Pet. at 5, 18-20.) This utterly ridiculous argument ignores the obvious reason why the district court had no need to reach that issue. Under federal law, Guardian had thirty days to remove the case once it received notice of the possible grounds. *See* 28 U.S.C. § 1446(b) (1997). Contrary to Guardian's assertion that the issue that purportedly rendered the action removable was not in the case until the day of trial (Pet. at 3, 18-20), the state court found (and Judge Martin agreed), that the issue had been in the case for months. Thus, a remand was required and it was not necessary to (and Judge Martin did not) rule on the merits of Guardian's preemption argument.

II.

THE APPELLATE DIVISION'S ORDER DOES NOT GIVE RISE TO ANY QUESTION CONCERNING ERISA'S "SAVINGS CLAUSE"

Attempting to create the appearance of an issue worthy of granting a writ of *certiorari*, Guardian argues (Pet. at 20-23), without one iota of support from the text of the December 29, 1998 Order (Pet. App. A), that the Appellate Division based its decision on the statutory exemption from ERISA preemption applicable to state laws that regulate insurance. (*See* 29 U.S.C. § 1144(b)(2) (1997).) In fact, the limitation on ERISA preemption for state laws regulating insurance was not relied upon — or even mentioned — by Unibell in its brief to the Appellate Division, was obviously not relied upon by Guardian, and was not cited by the Appellate Division anywhere in its memorandum decision.[9] Guardian raised the point for the very first time in its motion to reargue.

In any case, the statutory exemption to ERISA preemption is entirely beside the point. The Appellate Division expressly recognized in its Order that Unibell had charged Guardian with wrongdoing in its capacity as a seller

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9. Guardian purports to glean from page references to two cases cited in the Appellate Division's Order that the court's decision was actually based on that exemption. (Pet. at 20-21.) In fact, Unibell had correctly cited to precisely those pages in its appellate brief (at 29) only as support for the proposition that ERISA preemption is "inappropriate in matters not directly related to plan administration or participant claims for benefits, particularly where a strong state interest is present, such as the state interest in regulation of the insurance industry." That is exactly the point for which the Appellate Division cited to those pages as well.

of insurance, not as a claims fiduciary, and that ERISA's preemption clause therefore did not apply. (Pet. at 2a.) The court was thus not required to reach, and did not reach, the question of whether, if Unibell's claims were otherwise preempted, there might be some exception that would apply.

As the Appellate Division's Order had nothing whatever to do with the statutory exemption to ERISA preemption, Guardian's discussion of *Unum Life Insurance Co. of America v. Ward*, __ U.S. __, 119 S. Ct. 1380 (1999), along with the rest of its discussion of ERISA's "savings clause" (Pet. at 21-22), is utterly beside the point. This case does not present that issue.

Finally, Guardian distorts the holding of *DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457 (7th Cir. 1990) (*cited* in Pet. at 21-22). In *DeBruyne*, plaintiffs were plan beneficiaries who alleged that the plan documents themselves contained misrepresentations. The court concluded that a claim under N.Y. Insurance Law section 4226 by plan beneficiaries *based on misrepresentations in the plan documents themselves* was preempted by ERISA and not saved by the statutory exemption for laws that regulate insurance. 920 F.2d at 468. By using section 4226 specifically to challenge ERISA plan documents, the plaintiffs in *DeBruyne* brought themselves into direct conflict with ERISA, which also provided a remedy for such misrepresentations. *Id.* at 470 (*citing* 29 U.S.C. § 1104(A)(1)(b) (1997)). In fact, the plaintiffs had alleged a violation of that very provision of ERISA in their complaint. Thus, plaintiffs' state law claim and their ERISA claim were virtually identical.

Contrary to the picture that Guardian attempts to paint, the court in *DeBruyne* did not hold that section 4226 was generally preempted by ERISA. Rather, the court held only that "the *specific* application of section 4226(a)(1) advocated by plaintiffs [was] preempted." *Id.* at 470 n.27 (emphasis added). Given the materially different claim under section 4226 that was raised by Unibell here, the *DeBruyne* case provides no support whatever for Guardian's contention that Unibell's claim was preempted. Moreover, the *DeBruyne* court's discussion of the statutory exemption to preemption is, like the same discussion in *Unum Life Ins. Co.*, wholly irrelevant, as it addresses a matter that has no bearing at all on the Appellate Division's decision in this case.[10]

In sum, the fourth of Guardian's "questions presented," concerning the applicability of the statutory exemption to ERISA preemption (Pet. at i) is likewise not a question that is in fact presented by this case.[11]

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10. Guardian also appears to argue that N.Y. Insurance Law Section 4226 is generally preempted because it provides for a remedy that is not available under ERISA. (Pet. at 22, *citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53-56 (1987).) Guardian is misreading *Pilot Life*. Whether a state law claim is pre-empted depends on whether it "relates to" an ERISA plan. There is nothing in the *Pilot Life* decision that suggests that the remedies available under the state law claim are a factor in that inquiry.

11. Guardian also takes issue with the fact that Unibell was awarded punitive damages. (Pet. at 22, *see also* Pet. "questions presented No. 5" at i.) The propriety of that award is not properly before this Court. Whether Unibell's substantive claims are preempted is not a function of the remedies available under state law. Because Unibell's claims are not preempted, there is no federal issue presented by this case with respect to punitive damages. Thus, the fifth of Guardian's "questions presented" does not provide a basis for this Court to issue a writ of *certiorari*.

CONCLUSION

For all the foregoing reasons, Guardian's petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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